110-386

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 230.

WILLIAM H. WEBSTER AND ROBERT T. COGLIN,
PLAINTIFFS IN ERROR,

vs.

THE BUFFALO INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED MARCH 16, 1881.

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INDEX.

	Original.	Print.
Citation	1	1
Writ of error	2	1
" " return to	3	2
Petition	4	2
Summons	9	4
Return	10	5
Petition and bond for removal	11, 13	5, 6
Clerk's certificate	15	7
Answer to petition	16	7
Demurrer to answer	28	12
Reply	30	13
Demurrer to reply	36	15
Motion for rehearing	39	17
Stipulation as to value	40	18
" for trial without jury	42	18
Judgment	43	19
Bill of exceptions	45	20
Findings of court	46	20
Charter of defendant	54	24
Opinion of the court	82	36
Bond	84	37
Clerk's certificate	85	37

1 The United States of America to the Buffalo Insurance Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Eastern District of Missouri, wherein William H. Webster and Robert T. Coglin are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Treat, judge of the Circuit Court of the United States for the Eastern District of Missouri, this 15th day of January, in the year of our Lord one thousand eight hundred and eighty-one.

SAMUEL TREAT,
Judge United States Circuit Court, Eastern District of Missouri.

(Endorsed:) United States Circuit Court, Eastern District of Missouri. Wm. H. Webster et al. vs. Buffalo Ins. Co. Citation.

2 UNITED STATES OF AMERICA, *ss.*

The President of the United States to the Honorable the Judge of the Circuit Court of the United States for the Eastern District of Missouri, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, at the September term, 1880, thereof, between William H. Webster et al., plaintiffs, and the Buffalo Insurance Company, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 15th day of January, in the year of our Lord one thousand eight hundred and eighty-one.

Issued at office, in the city of St. Louis, with the seal of the Circuit Court of the United States for the Eastern District of Missouri, dated as aforesaid.

[SEAL.] M. M. PRICE,
Clerk Circuit Court United States,
Eastern District of Missouri.

Allowed by— By T. L. CRAWFORD, *Deputy.*
SAMUEL TREAT, *Judge.*

3 *Return to Writ.*

UNITED STATES OF AMERICA, } *ss.*
EASTERN DISTRICT OF MISSOURI, }

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name, and affix the seal of said circuit court, at office, in the city of St. Louis, this 15th day of January, A. D. 1881.

[SEAL.] M. M. PRICE,
Clerk of said Court.
By T. L. CRAWFORD, *D. C.*

(Endorsed:) No. 1549. United States Circuit Court, Eastern District of Missouri. Wm. H. Webster et al. vs. Buffalo Ins. Co. Writ of error to the Circuit Court of the United States for the E. D. of Missouri.

4 UNITED STATES OF AMERICA, }
EASTERN DISTRICT OF MISSOURI. }

In the Circuit Court of the United States in and for said district.

Be it remembered, that on September 15th, 1879, there was filed in the office of the clerk of the Circuit Court of the United States for the Eastern District of Missouri a certain transcript of record from the St. Louis Circuit Court.

Which said transcript is in the words and figures following, to wit:

In the Circuit Court of the City of St. Louis, June Term, 1879.

WILLIAM H. WEBSTER AND ROBERT T. COGLIN, }
Plaintiffs, }
vs. }
BUFFALO INSURANCE COMPANY, DEFFNDANT. }

Petition.

STAE OF MISSOURI, } *ss.*
CITY OF ST. LOUIS, }

Plaintiffs allege that the date of the issuance of the policy of insurance hereinafter referred to, and from thence until about the

12th day of April, 1879, these plaintiffs and one Adolph G. Heinicke were co-partners in trade, doing business in the city of St. Louis, Missouri, under the firm name and style of Webster, Heinicke and Coglin. That on said last-mentioned date the said co-partnership was dissolved, and these plaintiffs then purchased and acquired all of the right, title, and interest of said Adolph G. Heinicke in and to all of the property and assets of said firm, including all his right, title, and interest in and to the policy of insurance
5 hereinafter mentioned. That since said last-mentioned date these plaintiffs have been and now are co-partners, doing business under the firm name of Webster, Coglin & Co.

Plaintiffs further allege that the defendant is a corporation organized under the laws of the State of New York with full power and authority to engage in the business of fire and marine insurance; that heretofore, to wit, on the 21st day of January, 1879, at the said city of St. Louis, the defendant, in consideration of an agreement on the part of said firm of Webster, Heinicke and Coglin to pay defendant the current rates of insurance for all its marine shipments of merchandise less a discount of 25 per cent., executed and delivered to said persons composing the firm of Webster, Heinicke and Coglin its open cargo policy of insurance herewith filed, numbered 0523, whereby it undertook and agreed to cause said firm of Webster, Heinicke and Coglin to be insured, lost or not lost, on shipments of merchandise to them at said city of St. Louis, for their account or for account of others, when instructed to insure by endorsement on bill of lading or otherwise, said firm stipulating to report all such shipments and mode of transit promptly to
6 the office of the defendant in the city of St. Louis as soon as advised thereof, in an amount not exceeding in the aggregate upon one vessel the sum of five thousand dollars. That the liabilities and perils which the defendant assumed and took upon itself under the terms of said policy as recited therein were of the seas, rivers, fires, pirates, overpowering thieves, and all other perils, losses, and misfortunes that had or should come to the injury, detriment, or damage of said property, or any part thereof, by reason of the dangers aforesaid. That it is further stipulated in said policy of insurance that the adventure of defendants upon all property insured thereunder shall begin immediately from the loading thereof on board the boat or vessel, and shall continue and endure until the arrival of the said boat or vessel at the port of destination. That on the 22d day of February, 1879, the said firm of Webster, Heinicke and Coglin caused to be shipped from the port of Liverpool in England on board of the British steamer Memphis, which was then and there destined for the port of New Orleans, Louisiana,
7 consigned to themselves at the said city of St. Louis for their own account, eighty crates of queensware, which were then and there of the value of five thousand ten dollars.

That said steamer departed from said port of Liverpool destined

to said port of New Orleans, and proceeded on her said voyage until the 27th day of February, 1879, when, by the perils of the sea, she was drifted on Pedrido Reef, near the port of Corunna, off the coast of Spain, where she became wrecked, and her cargo, including the said crates of queensware consigned to said firm of Webster, Heinicke and Coglin, were in part lost, and the remainder thereof damaged to such an extent as to render it entirely valueless. That on the 26th day of February, 1879, and immediately after, but on the same day of the receipt by them of an invoice of said crates of queensware, said firm of Webster, Heinicke and Coglin notified defendant, at its office in the said city of St. Louis, of said shipment of 80 crates of queensware from Liverpool, England, to the said city of St. Louis, and of the mode of transit of the
8 same, and requested defendant to insure said merchandise, under said policy of insurance, for the sum of 4000 dollars, which notice and application were received and accepted by defendant, and that thereby and by virtue of the provisions of said policy of insurance, defendant became bound to pay said firm all loss or damage sustained on account of said merchandise while in transit from the said port of Liverpool to the port of St. Louis, Missouri, by reason of any of the liabilities and perils assumed by defendant under the terms of said policy as above set forth, and plaintiffs allege that by reason of the loss and damage to said merchandise, as hereinbefore set forth, and by reason of said assignment of said Heinicke to plaintiffs, the defendant is liable to pay plaintiffs' said sum of five thousand and ten dollars. That on the 29th day of March, 1879, and after said loss, the defendant peremptorily declined to recognize any liability, on its part, under said policy of insurance, and refused and still refuses to pay any sum whatsoever to said firm of Webster, Heinicke and Coglin, or to these plaintiffs, on account of said loss and damage to said property. That
9 defendant has vexatiously delayed the payment of the amount due under said policy of insurance. Wherefore plaintiff prays judgment against defendant for said sum of 5010 dollars, and for damages for vexatiously delaying the payment thereof, and also for interest and costs.

LEE & CHANDLER,
Att'ys for Plff's.

Upon the filing of which petition a summons issued, which is in words and figures following, to wit:

Summons.

CITY OF ST. LOUIS, *ss.*

The State of Missouri to the Sheriff of the City of St. Louis, greeting:

We command you to summon Buffalo Insurance Company to appear before the judges of our circuit court, on the first day of

the next term thereof, to be held in the city of St. Louis, on the first Monday of June next, then and there to answer the complaint of William H. Webster and Robert T. Coglin, as set forth in the annexed petition, and have you then and there this writ.

Witness Charles F. Vogel, clerk of our said circuit court,
10 with the seal thereof hereto affixed, at office, in the city of St. Louis, this first day of May, in the year of our Lord eighteen hundred and seventy-nine.

[SEAL.] CHAS. F. VOGEL, *Clerk.*

Upon which summons the sheriff made his return in words and figures as follows, to wit:

Sheriff's Return.

Executed this writ in the city of St. Louis, on the 2d day of May, 1879, by delivering a copy of the writ and petition, as furnished by the clerk, to Martin Collins, the person authorized by the written instrument or power of attorney of the Buffalo Insurance Company, the defendant named within, duly signed and sealed, and filed with the superintendent of the insurance department of Missouri, to receive service of process for and in behalf of said company in this state.

JOHN FINN,
Sheriff of the City of St. Louis.
By JAMES MORAGHAN, *Deputy.*

And at a special term of said circuit court, being the June term, 1879, the following proceedings were had in said cause, to wit:

11 *Petition and Bond for Removal filed and Order for Removal.*

TUESDAY, *June 24th*, 1879.

WILLIAM H. WEBSTER AND ROBERT T. COGLIN
50219 *vs.*
BUFFALO INSURANCE COMPANY.

On petition of defendant, by attorney, this day filed, it is ordered by the court, that on the defendant's filing a good and sufficient bond according to law in the sum of five hundred dollars to be approved by the court, that this cause be removed to the Circuit Court of the United States for the Eastern District of Missouri. Thereupon the said defendant files a bond which is approved by the court; whereupon it is ordered that the clerk of this court forthwith certify to the Circuit Court of the United States for the Eastern District of Missouri a full, true and complete transcript of the record and proceedings in this cause, as fully as the same remains of record in his office.

Which petition for removal and bond are respectively in words and figures following, to wit:

Petition for Removal.

WILLIAM H. WEBSTER AND ROBERT T. COGLIN, PLAINTIFFS,
vs.
BUFFALO INSURANCE COMPANY, DEFENDANTS.

STATE OF MISSOURI, } *ss.*
CITY OF ST. LOUIS, }

In the Circuit Court of the City of St. Louis.

To the June Term, A. D. 1879.

The petition of the said defendants, the Buffalo Insurance Company, respectfully showeth:

That the said Buffalo Insurance Company is a body corporate, created and existing under and by virtue of the laws of the State of New York, and that, therefore, the defendants are citizens of the State of New York.

That the plaintiffs are citizens of the said State of Missouri; that the said action of the plaintiffs is brought upon a policy of insurance to recover for an alleged loss of goods by perils of the seas; and that the amount in dispute between the said plaintiffs and defendants exceed the sum or value of five hundred dollars, exclusive of costs.

And your petitioners now offer to give good and proper security, according to the act of Congress in such cases made and provided, for the entering of said cause, and copies of the pleadings
13 and all papers heretofore filed in said cause, and for the appearance of the defendants in the Circuit Court of the United States for the Eastern District of Missouri on the first day of the next term of said court, to be holden at the city of St. Louis, on the Monday of September next. Wherefore, the defendants pray the court here to order the removal of said cause to said Circuit Court of the United States for the Eastern District of Missouri, and to proceed no further.

THE BUFFALO INSURANCE COMPANY,
By its Attotrney, O. B. Sansum.

STATE OF MISSOURI, } *ss.*
CITY OF ST. LOUIS, }

Oliver B. Sansum, being duly sworn upon oath, states that the matters and things in the foregoing petition are true of his own knowledge.

O. B. SAMSUM.

Sworn to and subscribed before me, June 24th, 1879.
CHAS. F. VOGEL, *Clk.*

Bond for Removal.

Know all men by these presents, that we, the Buffalo Insurance Company, as principal, and Gustavus H. Koch and Oliver B. San-

sum, as sureties, are held and firmly bound in the penal sum of five hundred dollars, well and truly to be paid to William H.
14 Webster and Robert T. Coglin, to the payment of which we bind ourselves, our heirs, executors, and administrators severally and jointly, firmly by these presents.

The condition of this obligation is such that whereas the said William H. Webster and Robert T. Coglin have commenced an action in the Circuit Court of the City of St. Louis against the said Buffalo Insurance Company, and the said Buffalo Insurance Company hath petitioned the said court to remove the said cause into the Circuit Court of the United States for the Eastern District of Missouri:

Now, if the said Buffalo Insurance Company shall enter their appearance in said cause at the next session of said court on the first day of said session, and shall enter in said court at the time last mentioned copies of all process, pleadings, and other papers that have been filed in said cause in the said Circuit Court of the City of St. Louis, then this obligation shall be void, otherwise it shall remain and be in full force and effect.

BUFFALO INS. CO., BUFALO, N. Y
By G. H. KOCH, *Ag't.*
G. H. KOCH. [SEAL.]
O. B. SANSUM. [SEAL.]

15 Approved in open court, June 24, 1879.
CHAS. F. VOGEL, *Clk.*

STATE OF MISSOURI, } *ss.*
CITY OF ST. LOUIS, }

Clerk's Certificate

I, Charles F. Vogel, clerk of the Circuit Court, City of St. Louis, certify the above and foregoing to be a full, true, and complete transcript of the record and proceedings in the above-entitled cause as fully as the same remains of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office in the city of St. Louis, this eighth day of August, 1879.

[SEAL.] CHAS. F. VOGEL, *Clerk.*

16 And afterwards, to wit, on the 20th day of September, A. D. 1879, the following answer was filed for record in said cause, to wit:

Answer to Petition.

EASTERN DISTRICT OF MISSOURI, *ss:*

In the Circuit Court of the United States for the Eastern District of Missouri, September Term, A. D. 1879.

WILLIAM H. WEBSTER AND ROBERT T. COGLIN,
Plaintiffs,
vs.
BUFFALO INSURANCE COMPANY, DEFENDANTS.

And for answer to the said plaintiffs' petition, and to the matters and things in said petition stated and set forth, the defendants say: They admit the copartnership of the plaintiffs, and that the plaintiffs are the owners of all the assets of the late firm of Webster, Heinicke and Coglin. They also admit that the defendants are a body corporate, created by the laws of the State of New York; they admit that, by the power conferred upon them by their
17 charter, they have power to insure property against loss by fire; but they deny that they have power under said charter to insure against loss that may occur upon the high seas. They deny that they ever made any agreement with the said firm of Webster, Heinicke and Coglin to insure all, or any of their marine shipments of merchandise, upon any consideration whatsoever. And they deny that the policy of insurance mentioned and described in said petition was intended to insure any marine shipments whatsoever; defendants also deny that the goods mentioned was shipped as alleged in said petition; and they deny any loss of the same as alleged in said petition; the defendants admit that the firm of said Webster, Heinicke and Coglin, on or about the date mentioned in said petition, sent to the office of defendants' agent in St. Louis, an application to insure certain queensware, said to have been laden at Liverpool, England, on the steamer Memphis, which vessel, the application stated, was bound for New Orleans, in the State of Louisiana; but they say that defendants then had William
18 R. Kerr as their agent in the said city of St. Louis, and no other person but said William R. Kerr was authorized to make contracts for defendants; and defendants also say, that so soon as said application was presented to said William R. Kerr he rejected the same, on the ground that the defendants had no power under their said charter to insure any goods or property upon the high seas, and he stated to the person who made said application that by the terms of said charter the defendants were limited to insuring property against the perils of inland navigation; and the said William R. Kerr refused to accept said risk for said defendants; and defendants deny that they ever became liable in any sum whatever to said firm of Webster, Heinicke and Coglin, or to said plaintiffs.

Second. And for another and further defence to said alleged cause of action in said petition stated and set forth, defendants say: That they never had power to make the said contract in the said petition stated and set forth, because they say that, on the fif-
19 teenth day July, in the year of our Lord one thousand eight hundred and seventy-four, the defendants were incorporated under the laws of the state of New York, and were then and there,

by charter then and there granted to the defendants, given power to make insurance on dwelling houses, stores, and all kinds of buildings, and upon household furniture and other property, against loss or damage by fire, and to make insurance upon vessels, boats, cargoes, goods, merchandise, freights, and other property, against loss or damage by all or any of the risks of lake, river, canal, and inland navigation and transportation, and the said defendants were given no other power whatsoever; and the defendants aver that said charter has never been altered, amended, or changed in any respect whatsoever. All of which matters and things the defendants offer to prove and verify by the record thereof. Wherefore defendants pray judgment.

Third. And for another and further defence to said plaintiffs' said of action in said petition stated and set forth the defendants say that they never made but one contract or policy of in-
20 surance with the said firm of Webster, Heinicke and Coglin, which said contract or policy of insurance is in the words and figures, printed and written, as follows:

No. 0523. River cargo.

Buffalo Insurance Company of Buffalo, N. Y.

This policy of insurance witnesseth:

That the Buffalo Insurance Company do by these presents cause Webster, Heinicke & Coglin to be insured, lost or not lost, in the sum as per printed form attached to cargo policy No. 0523 of Buffalo Ins. Co.:

1st. In such sums on shipments of property from St. Louis as they may apply for in person or by letter mailed to the office of this company at St. Louis on the day upon which said shipments are made.

2d. On shipments of merchandise to them at St. Louis for their account, or for account of others when instructed to insure by endorsement on bill of lading or otherwise, they stipulating to report all such shipments and modes of transit promptly to this office as soon as advised thereof.

3d. The aggregate am't of this co'.s liability under the within policy shall in no case exceed the sum of $ on one
21 vessel at any one time unless special arrangements are mutually agreed upon for amounts exceeding said $5000. St. Louis, Jan'y 21st, 1879. W. R. KERR & CO.

Warranted by the assured free from claim for loss or damage arising from civil commotion, or from piracy, seizure, sequestration, or detention and overpowering thieves, or the consequence of any other hostile act of the government or people, person or persons of any state or territory of this Union, or of any state or states claiming to have seceded from this Union. Each package shall be subject to its own average.

Beginning the adventure upon said property from and immediately following the loading thereof on board the said boat or vessel, and so shall continue and endure until the arrival of said boat or vessel at the port of destination, and with reasonable time allowed to discharge the cargo; and it shall and may be lawful for the said boat or vessel during the voyage to proceed to and touch at any intermediate places if thereunto obliged by stress of weather or other unavoidable accident, or for the transaction of any lawful
22 business connected with the voyage, without prejudice to this insurance; and in case of any loss or damage resulting from any peril insured against it shall be the duty of the party insured and the factors, agents, servants, and assigns of the insured to sue, labor and travel for in and about the defence, safeguard, and recovery of said property, and use all proper means for the security, preservation, relief and recovery thereof, without prejudice to this insurance; to the charges whereof the said insurance company will contribute in proportion as the sum hereby insured bears to the whole sum at risk, having been paid the consideration for this insurance at and after the rate of per cent.

Touching the liabilities and perils which the said insurance company hereby assumes and takes upon itself in the premises, they are of the seas, rivers, fires, pirates, overpowering thieves, (but no other thieves,) jettisons, and all other perils, losses, and misfortunes that have or shall come to the injury, detriment, or damage of said property, or any part thereof, by reason of the dangers aforesaid.

And in case of loss or damage happening on board of any
23 steamboat on the western waters, which boat may have deviated to assist any other boat or vessel in distress, the assured shall be paid by this company the amount of such loss or damage as though no such deviation had occured, upon the assured assigning to this company all claims he or they may have against the owner or owners of such steamboat in consequence of such deviation, and authorizing this company to use his or their name or names to enforce such claims against the said owner or owners for the sole benefit and use of this company.

And in case of total loss, the adjustment of the same shall be made upon the valuations specified in the policy, if any; but in the absence of a valuation, then upon the invoice price without reference to the market value of the article insured. But in case of partial loss or damage, reference must be had to the market value of the article insured to fix the per centum of damage, which shall be the difference between the sound cash market value and the article in its damaged state; which per centum of loss or damage must be applied to the value fixed in the policy, and in the
24 absence of such valuation, then upon the invoice price, to determine the sum for which this company shall be liable. And the assured shall be paid the amount of such loss or damage in sixty days after proof of loss and proof of interest in said shipment—

the amount of the premium note, if unpaid, and all other debts, dues and demands of said company against the said insured, being first deducted.

The company shall in no wise be liable for any loss under this policy unless suit for the same be commencedagainst this company within one year from the date of such loss. And it is mutually agreed that the acts of either party, or their agents in securing, preserving or recovering the property insured, shall not be considered or held to be either a waiver or acceptance of an abandonment.

And it is also agreed, that the insurers shall not be liable for any partial loss on leaf tobacco in hogsheads or bales, bulk pork, sheet iron, corn or grain of all kinds, beans, flax or hemp not baled or covered with bagging entirely, bale rope, bagging, green fruit and vegetables, household and cabinet furniture, pleasure carriages, books and stationery, tin plate and cutlery, unless it amounts to twenty per cent., exclusive in all cases of all charges and expenses incurred for the purpose of ascertaining and proving the loss; and no partial loss or particular average shall in any case be paid unless amounting to ten per cent., but the assured shall recover on a general average.

And it is also agreed that the insurer shall not be liable for damage to goods by wet or dampness, or by being spotted, discolored, moldy, or rusty, unless the same be caused by some disaster to the vessel and proof thereof be furnished; and also that money or bullion are not covered by this policy, unless specified.

And it is further agreed that the said company is not liable for leakage on molasses or other liquids; and that the assured are not to abandon on account of the grounding or detention of said boat or vessel.

And it is also agreed that if the assured shall have made any other assurance upon the premises aforesaid prior in date to this policy, then the said insurance company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the premises hereby assured, and the said insurance company shall return the premium upon so much of the sum insured as they shall be by such prior assurance exonorated from. And in case of any insurance upon the said premises, subsequent in date to this policy, the said insurance company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers; and shall accordingly be entitled to retain the premium by them received in the same manner as if no subsequent assurance had been made: provided, that the said insurance company shall contribute towards any loss in the premises only in proportion, as the sum hereby insured bears to the whole sum at risk belonging to the assured.

And it is also agreed that the insurer shall not be answerable

for any charge, damage, or loss which may arise in consequence of the assured engaging, or having engaged, in illicit or prohibited trade at any time whatever.

It is also agreed, by the parties to this policy, that no
27 premium shall be abated or returned on account of any deviation that shall be made by the owners or their agents, and if the voyage aforesaid shall have been begun, and shall have terminated before the date of this policy, there shall be no return of premium on account of such termination of the voyage.

That, in all cases not otherwise stipulated, the first shipment or shipments, made or to be made within the period embraced by these presents, answering to the description of the subject herein assured, shall apply to this policy.

In witness whereof the Buffalo Insurance Company hath caused these presents to be signed by its president and attested by its secretary, in the city of Buffalo, N. Y.

But this policy shall not be void until countersigned by the duly authorized agents of the Buffalo Insurance Company, at St. Louis, Mo.

PASCAL P. PRATT, *President.*
W. K. KERR & Co., *Agents.*

EDW'D B. SMITH, *Secretary.*

Countersigned at St. Louis, Jan'y 21, 1879.

And the defendants aver that the aforesaid contract or policy of insurance did not include goods and merchandise laden upon
28 any ship or vessel at the port of Liverpool, England; but the said policy or contract of insurance was limited to "*river cargo*," and nothing else. All of which the defendants are ready to verify and prove by the original policy or contract of insurance on inspection thereof. Wherefore the defendants pray judgment.

And the defendants, having fully answered all matters and things in said petition stated and set forth, pray to be dismissed, with their costs allowed.

O. B. SANSUM,
Att'y for Defendants.

And afterwards, to wit, on Nov. 17th, 1879, there was filed the following demurer to answer, to wit:

In the Circuit Court of the United States, Eastern District of Missouri.

WILLIAM H. WEBSTER ET AL., PLAINTIFF,
vs.
BUFFALO INSURANCE COMPANY, DEFENDANTS.

Demurrer to Answer.

And now, at this day, comes the plaintiff herein and de-
29 murs to the second defence set up in defendant's answer

filed herein, wherein defendant pleads that it had no power to make the contract in plaintiff's petition set forth for the following reasons, to wit:

Because the allegations contained therein constitute no defence to plaintiff's cause of action.

Because defendant is estopped from pleading its want of power to make the contract sued upon.

Because the government which created the corporation alone has power to deal with said corporation for a violation of its chartered priveleges, and the defendant cannot plead its own wrong to escape liability under the contract sued upon.

LEE & CHANDLER,
Attys. for Pltff.

And afterwards, to wit, on the 6th day of December, 1879, the following further proceedings were had and appear of record in said cause, to wit:

WILLIAM H. WEBSTER ET AL., PLAINTIFF,
1549 *vs.*
BUFFALO INSURANCE COMPANY, DEFENDANT.

30 Now come the parties, by their attorneys, and the court having considered the demurrer of plaintiff to the second count of defendant's answer, and being fully advised in the premises, orders that said demurer be overruled.

And afterwards, to wit, on the 31st day of December, A. D. 1879, the following reply was filed for record, which said reply is in words and figures as follows, to wit:

Reply.

In the Circuit Court of the United States for the Eeastern District of Missouri.

WILLIAM H. WEBSTER. ET AL PLAINTIFF,
vs.
BUFFALO INSURANCE COMPANY, DEFENDANTS.

And now at this day comes the plaintiffs herein and for reply to the new matter set up in the first defence pleaded by defendants in its answer herein they deny each and every allegation thereof.

1st. And for a reply to the second defence in defendants answer contained, plaintiffs say that they have no knowledge or infor-
31 mation sufficient to form a belief whether or not the defendant had power to make the contract of insurance in plaintiff's petition set forth, and they therefore deny that it had no authority under the charter so to do.

2d. And for a further reply to the second defence pleaded by defendant, they say that it is wholly immaterial whether said corporation had power under its charter to make said contract, because

they say that defendant is estopped to set up said defence for the following reasons, to wit:

Plaintiffs allege that by the terms of said contract, the defendant undertook and agreed with said firm of Webster, Heinicke and Coglin to insure, and did insure, said firm against the risks and perils of the seas on shipments of merchandise to them at St. Louis for their account, or for account of others when instructed to insure by endorsement on bill of lading, or otherwise, plaintiffs stipulating to report all such shipments and modes of transit promptly to defendant's office in the city of St. Louis as soon as advised thereof,

32 and plaintiffs allege that as soon as they were advised of said shipment, to wit, on the 26th day of February, 1879, they notified defendant at its office in said city of St. Louis of the shipment to them at the said city of St. Louis from the port of Liverpool, England, on some steamboat whose name was then unknown to said firm of the merchandise mentioned in plaintiffs' petition, and requested defendant to enter said shipment on defendant's books, at the valuation of four thousand dollars, and then and there delivered to defendant a written and printed application for entering said merchandise under said policy upon a blank form furnished by defendant therefor. Whereupon the defendant, by and through its agents, W. R. Kerr & Company, who were then and there duly authorized so to do, accepted said notice, and then and there agreed to accept said risk for said firm under said policy of insurance, and to enter the same upon the books of said company and to cover the merchandise mentioned in plaintiffs' petition under said policy in the sum of four thousand dollars.

33 That afterwards, on the 6th day of March, 1879, the defendant for the first time notified said firm of Webster, Heinecke and Coglin that it had no power under its charter to effect insurance upon ocean risks and returned said application to said firm. That long prior to said last mentioned date, to wit, on the 1st day of March, 1879, it became well known in the city of St. Louis and elsewhere, and the fact was that the steamer Memphis, upon which the merchandise of plaintiffs' said firm was laden, had been totally wrecked, and said merchandise lost and destroyed as alleged in plaintiffs' petition, and by reason thereof it became and was impossible for said firm of Webster, Heinecke and Coglin to effect other insurance upon their said merchandise, as defendant then and there well knew; and plaintiffs further allege that by reason of the language employed in said contract of insurance touching the liabilities, perils, and risks assumed by defendant as aforesaid, and by reason of the agreements of defendant at the time when said shipment was reported to defendant, on

34 the 26th day of February, 1879, as aforesaid, plaintiffs' said firm were led to believe, and did believe, that defendant was fully authorized and empowered to make said contract, and that but for said belief, they could and would have effected other insurance on said merchandise on said 26th day of February, 1879.

That plaintiffs' said firm never had any knowledge or information of the authority conferred upon defendant by its charter until apprised thereof, as before stated, on said 6th day of March, 1879.

That plaintiffs are now informed and believe that defendant was incorporated and created under the laws of the State of New York; and the said firm had no opportunity of knowing and did not know, except by its undertakings and agreements as hereinbefore set forth, what powers were conferred upon said corporation; that plaintiffs' said firm, in procuring said insurance upon said merchandise, acted in entire good faith; and if said defendant had not the power to make said contract and to effect said insurance for plaintiffs' said firm, it has deceived and mislead plain-
35 tiffs' said firm into the belief that it had power to enter into said undertakings and ought not now to be permitted to avail itself of the defence of want of power to make said contract.

And further replying to defendant's answer herein and to the third defence thereof, plaintiffs admit that the policy of insurance set out in said third defence is substantially the same as the policy issued by defendant to plaintiffs' said firm, and plaintiffs allege that said policy was executed and delivered to their said firm by defendant, on the 21st day of January, 1879, and was in full force and effect at the dates and times when defendant undertook and agreed to insure the merchandise mentioned in plaintiffs' petition, to wit, on the 26th day of February, 1879.

Plaintiffs say that it is not true that said contract or policy of insurance did not include goods and merchandise laden upon any ship or vessel at the port of Liverpool, England; or that said policy or contract of insurance was limited to "river cargo," and nothing else.

36 For reply to the other matters and things stated in defendant's third defence set out in its answer therein, plaintiffs deny each and every allegation thereof.

Wherefore plaintiffs pray judgment against defendant as demaded in their petition filed herein.

LEE & CHANDLER,
Attys. for Plffs.

And afterwards, to wit, on the 31st day of December, 1879, the following demurrer to plaintiffs' replication was filed for record in said cause, to wit:

EASTERN DISTRICT OF MISSOURI, *ss.*

In the Circuit Court of the United States for the Eastern District of Missouri.

To the September Term, A. D. 1879.

41 WILLIAM H. WEBSTER AND ROBERT T. Coglin, Plaintiffs,
vs.
THE BUFFALO INSURANCE COMPANY, Defendant.

Stipulation.

The plaintiffs and the defendants agree that the value of the merchandise described in the plaintiffs' said petition is the sum of $4,800, and that upon the trial of this cause neither party shall give any evidence as to said value. *Also*, that if the court shall be of opinion that the plaintiffs are entitled to judgment, the judgment shall be entered for the sum of $5,010. But this agreement is expressly limited to the single fact of value, and is not to be taken as admitting any right of the plaintiffs to recover in this case. It being well understood by the plaintiffs that, as to all facts necessary to be proved by the plaintiffs to entitle them to judgment, they must make legal proof thereof, excepting only the value of the merchandise aforesaid.

April 23rd, 1880.

O. B. SANSUM,
Atty. for Defts.
LEE & CHANDLER,
42 *Attys. for Plfs.*

And afterwards, to wit, on the 14th day of April, 1880, the following stipulation for trial without a jury was filed for record in said cause, to wit:

WILLIAM H. WEBSTER ET AL.
vs.
BUFFALO INSURANCE COMPANY.

Stipulation for trial without Jury.

In the Circuit Court of the United States for the Eastern District of Missouri.

At the September term, A. D. 1880.

The parties above named hereby consent that the above entitled shall be tried by the court without a jury—the judge to find the facts specially.

O. B. SANSUM,
Atty. for Defts.
LEE & CHANDLER,
Attys. for Pltffs.

And afterwards, to wit, at a term of court held on the 2d day of October, A. D. 1880, the following further proceedings were had and appear of record in said cause, to wit:

WILLIAM H. WEBSTER ET AL., PLAINTIFFS,
1549 *vs.*
BUFFALO INSURANCE COMPANY, DEFENDANT.

Now come the parties, by their attorneys, and the court
43 having examined the questions of law arising upon the demurrer to the replication herein, finds the law thereon for the defendant; it is therefore ordered that said demurrer be and the same is hereby sustained.

And afterwards, to wit, at a court held on the 10th day of December, 1880, the following further proceedings were had and appear of record in said cause, to wit:

WILLIAM H. WEBSTER ET AL., PLAINTIFFS,
1549 *vs.*
BUFFALO INSURANCE CO., DEFENDANT.

Now come the parties, by their attorneys, and file a stipulation waiving a jury herein; and thereupon said cause came on for trial and was argued and submitted and taken under advertisement.

And afterwards, to wit, on the 4th day of January, A. D. 1881, the following further proceedings were had and appear of record in said cause, to wit:

WILLIAM H. WEBSTER ET AL., PLAINTIFF,
1549 *vs.*
THE BUFFALO INSURANCE CO., DEFENDANT.

44 Now again come the parties, by their respective attorneys, the plaintiffs by Messrs. Lee and Chandler, and the defendant by O. B. Sansum, Esq., and this cause having been heretofore submitted to the court, without the intervention of a jury, upon the pleadings, proofs, and arguments of counsel, upon consideration whereof, and being fully advised in the premises, the court finds the issues upon the second defence in defendant's answer for the defendant, and all the other issues the court finds for the plaintiffs, and orders that judgment be entered herein upon said finding of facts for the defendant.

It is therefore considered by the court that the plaintiff take nothing by their writ herein; that the defendant, the Buffalo Insurance Company, go hence without day, and have and recover of the said plaintiffs, William H. Webster and Robert T. Coglin, its costs in this behalf expended, and that a fee bill or execution issue therefor.

And afterwards, to wit, on the 15th day of January, A. D. 1881, the following further proceedings were had and appear of record in the above cause, to wit:

I. Winslow, Jas. G. Forsythe, A. P. Wright, Jas. R. Smith, David R. Marse.

Buffalo, April 22, 1874.

STATE OF NEW YOYK, } ss.
ERIE COUNTY, CITY OF BUFFALO, }

Anthony E. Schweigert, of the city of Buffalo, being duly sworn, deposes and says that he is assistant foreman in the office of the Buffalo *Daily Courier*, a newspaper published in said city by Warren Johnson & Co.; that the notice, of which the annexed printed slip taken from said newspaper is a copy, was inserted and published therein on the twenty-third day of April, 1874; that
50 said notice was published once in each week for six consecutive weeks after the first publication thereof, and not more than six days intervened between any two publications thereof.

ANTHONY E. SCHWEIGERT.

Sworn before me, this 20th day of June, 1874.

SAMUEL F. HARTMAN,
Notary Public.

To all to whom these presents shall come: Know ye, that we, Pascal P. Pratt, Abel T. Blackmar, James N. Matthews, James G. Forsythe, John M. Hutchinson, Frederick L. Danforth, Townsend Davis, Frank W. Fiske, Elbridge G. Spaulding, Gibson T. Williams, Solomon Drullard, Alfred P. Wright, Charles A. Sweet, Edwin T. Evans, Phineas S. Marsh, James D. Sawyer, Edward L. Stevenson, James R. Smith, Edward B. Smith, William H. Glenny, William Meadows, Samuel K. Worthington, Henry C. Winslow, Henry Morse, John H. Wright, Alonzo Richmond, Seneca A. Clark, John B. Griffin, Albert C. Miller, David R. Morse, do, by these presents, declare that we intend to, and hereby do, associate ourselves together and form an incorporated company for the purpose of transacting the business of insurance, and to make insurance on dwelling houses, stores and all kinds of build-
51 ings and upon household furniture and other property against loss or damage by fire; and to make insurance upon vessels, boat, cargoes, goods, merchandise, freights, and other property against loss or damage by all or any of the risks of lake, river, canal, and inland navigation and transportation, under and by virtue of the provisions of and act of the legislature of the State of New York, entitled "An act to provide for the incorporation of fire insurance companies," passed June 25, 1853, and an act of the legislature of said state, entitled "An act in relation *in* inland navigation insurance companies, passed March 27, 1861, and the several acts amending or in addition to the same." And we do also declare that the charter of said company shall be as follows, to wit:

Charter. Section I.

Pascal P. Pratt, Abel T. Blackmar, James N. Matthews, James G. Forsythe, John M. Hutchinson, Frederick L. Danforth, Townsend Davis, Frank W. Fiske, Elbridge G. Spaulding, Gibson T. Williams, Solomon Drullard, Alfred P. Wright, Charles A.
52 Sweet, Edwin T. Evans, Phineas S. Marsh, James D. Sawyer, Edward L. Stevenson, James R. Smith, Edward B. Smith, William H. Glenny, William Meadows, Samuel K. Worthington, Henry C. Winslow, Henry Morse, John H. Wright, Alonzo Richmond, Seneca A. Clark, John B. Griffin, Albert C. Miller, David R. Morse, their associates and successors, shall constitute a corporation for the purpose of transacting the business of insurance, as herein expressed and set forth, and the name of the said corporation shall be "The Buffalo Insurance Company."

Section II.

The principal office for the transaction of the business of said company shall be located at the city of Buffalo, in the county of Erie and State of New York.

Section III.

The corporate powers of said company shall be exercised in the mode and manner following, viz:

First. The said company shall transact the business of insuring dwelling-houses, stores, and all kinds of buildings, household furniture, vessels, boats, cargoes, goods, merchandise, freights, and other property, under and pursuant to the provisions of an act
53 of the legislature of the State of New York, entitled "An act to provide for the incorporation of fire insurance companies," passed June 25, 1853, and an act of the legislature of said State, entitled "An act in relation to inland navigation insurance companies," passed March 27, 1861, and the several acts amendatory of or in addition to the same, and such other business as is incidental to and necessarily connected with such insurance business, and may be lawfully transacted by said company, under and pursuant to the provisions of the acts aforesaid.

That the defendants made and delivered to the plaintiffs, on the 21st day of January, A. D. 1879, the policy of insurance set out *verdatim* in defendant's answer filed in this cause, which is copied in the record.

SAMUEL TREAT, *Judge.*

Except upon the plea of ultra vires, the court found for defendant, to which finding of the court upon said issues the plaintiff then and there excepted.

54 And be it further remembered that all the evidence offered by defendant to sustain his plea of ultra vires, and

all the evidence received by the court, was the charter of the said defendant, in words and figures as follows, to wit:

Charter. Section 1.

Pascal P. Pratt, Abel T. Blackmar, James N. Matthews, James G. Forsyth, John M. Hutchinson, Frederick L. Danforth, Townsend Davis, Frank W. Fiske, Elbridge G. Spaulding, Gibson T. Williams, Solomon Drullard, Alfred P. Wright, Charles A. Sweet, Edwin T. Evans, Phineas S. Marsh, James D. Sawyer, Edward L. Stevenson, James R. Smith, Edward B. Smith, William H. Glenny, William Meadows, Samuel K. Worthington, Henry C. Winslow, Henry Morse, John H. Vought, Alonzo Richmond, Seneca A. Clark, John B. Griffin, Albert C. Miller, David R. Morse, their associates and successors, shall constitute a corporation for the purpose of transacting the business of insurance, as herein expressed and set forth, and the name of the said corporation shall be "The Buffalo Insurance Company."

55 Section 2.

The principal office for the transaction of the business of said company shall be located at the city of Buffalo, in the county of Erie and State of New York.

Section 3.

The corporate powers of said company shall be exercised in the mode and manner following, viz:

First. The said company shall transact the business of insuring dwelling-houses, stores, and all kinds of buildings, household furniture, vessels, boats, cargoes, goods, merchandise, freight, and other property, under and pursuant to the provisions of an act of the legislature of the State of New York, entitled "An act to provide for the incorporation of fire insurance companies," passed June 25, 1853, and an act of the legislature of said state, entitled "An act in relation to inland navigation insurance companies," passed March 27, 1861, and the several acts amendatory of or in addition to the same, and such other business as is incidental to and necessarily connected with such insurance business, and may be
56 lawfully transacted by said company, under and pursuant to the provisions of the acts aforesaid.

Second. The business of said company shall be conducted, and its corporate powers exercised by a board of twenty-eight directors, a majority of whom shall be citizens of the State of New York.

Third. The board of directors shall choose from their own body a president and vice-president, who shall hold office for one year, and until their successors be chosen. The powers and duties of the president and vice-president shall be defined by the board.

Fourth. The board of directors shall have power to establish agencies in other parts of the state and in other states. They shall

choose a secretary and such other clerks and servants of the corporation as shall be necessary, and change them at pleasure; and they shall fix the amount of the salaries and allowances of all persons in the service of the corporation, and define and limit their powers and duties.

Fifth. The board of directors shall adopt a seal as the cor-
57 porate seal of the company, and may change and alter the same at their pleasure, and they shall make such by-laws for the government of the officers, and the conduct of the affairs of the company, as shall not be inconsistent with law or with this charter.

No by-law shall be amended or repealed, except by the vote of at least a majority of the members of the board.

Sixth. The board of directors shall, from time to time, declare and provide for the payment of such dividends as by law can be declared and paid, and, as in its judgment, shall be advisable.

Seventh. The board of directors shall have the power to appoint committees of its members to transact any portion of the ordinary business of the company and to define the powers of such committees.

Eighth. Nine of the directors shall constitute a quorum of the board for the transaction of business.

Section 4.

The mode and manner of electing the directors and of filling vacancies shall be as follows:

58 First. Pascal P. Pratt, Abel T. Blackmar, James N. Matthews, James G. Forsyth, John M. Hutchinson, Frederick L. Danforth, Townsend Davis, Frank W. Fiske, Elbridge G. Spaulding, George B. Sloan, Solomon Drullard, Alfred P. Wright, Charles A. Sweet, Edwin T. Evans, Phineas S. Marsh, James D. Sawyer, Edward L. Stevenson, James R. Smith, Edward B. Smith, William H. Glenny, William Meadows, Samuel K. Worthington, Henry C. Winslow, Henry Morse, John H. Vought, Alonzo Richmond, Seneca A. Clark, John B. Griffin, shall be the first directors of the company.

Second. The directors at the first meeting of the board shall divide themselves into four classes af seven each. The term of the first class shall expire on the second Tuesday of February, 1875; the term of the second class shall expire on the second Tuesday of February, 1876; the term of the third class shall expire on the second Tuesday of February, 1877; the term of the fourth class shall expire on the second Tuesday of February, 1878. Each class shall, however, hold office until their respective successors are elected.

Third. On the second Tuesday in February, 1875, and an-
59 nually thereafter, an election shall be held for seven directors, who shall hold office for four years, and until their respec-

tive successors are chosen, in the place of those whose terms of-
fice shall expire on the day of such election. Vacancies in the
board of directors occurring in the intervals between the annual
elections may be filled by the board of directors. The persons
appointed to fill such vacancies shall respectively hold office until
the end of the unexpired term, and until their successors are chosen.

Fourth. Ten days' previous notice shall be given in two public
newspapers, published in the city of Buffalo, of the time and place
of holding each annual election. All elections shall be held at the
principal office of the company.

Fifth. The annual election shall be conducted in the mode and
manner prescribed by law, and by Article Second of Title Two of
Chapter Eighteen of Part First of the Revised Statutes, and of the
several acts amending the same. The inspectors of elections for
the first election shall be appointed by the board of director.

60 Sixth. If an election of directors shall not be made on
the day appointed in this charter, it shall be lawful to hold
an election at any time, within sixty days thereafter, ten days'
previous notice thereof being given in two public newspapers pub-
lished in the city of Buffalo.

Section 5.

The period for the commencement of the fiscal year of the com-
pany shall be noon of the first day of January in each year.

Section 6.

The amount of capital to be employed in the transaction of the
business of the company shall be two hundred thousand dollars.
The capital stock of the company shall be divided into shares of
one hundred dollars each. The board of directors may, by an
affirmative vote of at least two-thirds of their number, authorize an
increase of the capital stock, in the manner provided by law, to any
amount not exceeding one million dollars.

Section 7.

No person shall hold the office of director who shall not
61 at the time be the owner in his own right of at least ten
shares of the capital stock of the company, and if any director
shall cease to own as aforesaid at least ten shares of said stock, his
office shall be vacant.

Section 8.

In case of vacancy in the office of president, the vice-president,
if there be one, (unless and until the board of directors shall elect
a new president from their number,) shall serve as president, and
if there be no vice-president, the board shall immediately choose a

president from their number; a vacancy in the office of vice-president shall be filled in like manner. In case either the president or vice-president shall cease to be a director, his office shall be vacant.

Section 9.

No stockholder shall be liable for any debt, responsibility or engagement of the company after the whole amount of the capital of the company shall have been paid in, and a certificate thereof recorded according to law.

Section 10.

62 Whenever stockholders, owning three-quarters of the capital stock of the company, shall in writing, to be filed in the office of the company, request the board of directors to close the business of the company, it shall be the duty of the board to proceed at once to close the business of the company as soon as practicable, and to procure its dissolution.

Section 11.

Each stockholder shall have the right at any election to cast, either in person or by proxy, one vote for every share of stock standing in his or her name on the books of the company for at least thirty days previously thereto. The stock shall only be transferable on books of the company kept for that purpose.

Section 12.

The duration of the company shall be thirty years.

In witness whereof, we, the subscribing corporators, have hereunto subscribed our names, this tenth day of June A. D. one thousand eight hundred and seventy-four.

63 Pascal P. Pratt, Gibson T. Williams, James G. Forsyth, A. P. Wright, Charles A. Sweet, Alonzo Richmond, John B. Griffin, Edwin T. Evans, Solomon Drullard, F. L. Danforth, William H. Glenny, Townsend Davis, E. L. Stevenson, A. C. Miller, P. S. Marsh, Seneca A. Clark, Henry C. Winslow, Frank W. Fiske, Edward B. Smith, Henry Morse, D. A. Morse, W. Meadows, S. K. Worthington, James D. Sawyer, E. G. Spaulding, J. N. Matthews, Abel S. Blackmar, John H. Vought, James R. Smith, J. M. Hutchinson.

STATE OF NEW YORK, }
ERIE COUNTY, CITY OF BUFFALO, } *ss.*

On this twenty-seventh day of June, A. D. 1874, before me, the subscriber, personally appeared Phineas S. Marsh, James D. Sawyer, Edward B. Smith, William Meadows, Samuel K. Worthington, Henry C. Winslow, John H. Vought, Seneca A. Clark, John B. Griffin, James G. Forsyth, John M. Hutchinson, Townsend Davis,

Frank W. Fiske, Elbridge G. Spaulding, Alfred P. Wright, Albert C. Miller, Frederick L. Danforth, William H. Glenny, Pascal P. Pratt, Gibson T. Williams, David R. Morse, Henry Morse
64 and James N. Matthews, being twenty-three of the individuals personally known to me and described in the within instrument, and who severally acknowledged the execution thereof; and on the twenty-ninth day of the same month and year personally appeared before me Solomon Drullard, Edward L. Stevenson, Abel T. Blackmar, and James R. Smith, being four of the idividuals personally known to me and described in and who executed the within instrument, and severally acknowledged the execution thereof; and also on the thirtieth day of the same month and year personally appeared before me Charles A. Sweet and Edwin T. Evans, being two of the individuals known to me and described in the within instrument, and severally acknowledged the execution thereof.

THOS. BATH,
Notary Public in and for Erie County.

ATTORNEY GENERAL'S OFFICE,
ALBANY, *July* 7, 1874.

I do hereby certify that I have examined the annexed charter and proof of the publication of the notice required by law
65 of the Buffalo Insurance Company, and that I find the same to be made in accordance with the requirements of the act entitled "An act to provide for the incorporation of fire insurance companies," passed June 25, 1853, and the several acts amendatory thereof, and not inconsistent with the constitution and laws of this state.

CHARLES S. FAIRCHILD,
Deputy Attorney-General.

To Hon. O. W. Chapman, Superintendent of Insurance Department State of New York.

INSURANCE DEPARTMENT, ALBANY, *July* 14, 1874.

Whereas, the corporators of the Buffalo Insurance Company, a joint-stock fire insurance company in process of organization, located in the city of Buffalo, N. Y., have filed a declaration and charter, with proof of publication of notice of intention, in the office of the superintendent of the insurance department, as required by the provisions of the act entitled "An act to provide for the incorporation of fire insurance companies," passed June 25, 1853, and of the amendments thereto subsequently passed, and the attorney general has certified to me that he has examined the same
66 and found them to be in accordance with the requirements of said act, and not inconsistent with the constitution or laws of this state:

Now, therefore, I, Orlow W. Chapman, superintendent of the Insurance Department of the State of New York, do hereby appoint

Hon. William Smyth and James Holmes, of the city of Albany, and H. J. Mills of Buffalo, N. Y., as commissioners to make an examination of the capital, securities, and affairs of the said company preliminary to organization, and to certify upon oath the result of said examination, pursuant to the provisions of the aforesaid act.

In witness whereof I have hereunto subscribed my name, and caused my official seal to be affixed in duplicate, at the city of Albany, this fourteenth day of July, A. D. 1874.

[S. L.]

WM. SMYTH,
Deputy Superintendent.

To the Hon. Orlow W. Chapman, Superintendent of the Insurance Department of the State of New York:

Whereas, we, the undersigned, three disinterested persons specially appointed for the purpose by the superintendent of the insurance department, having, in pursuance of such appoint-
67 ment hereto annexed, bearing date July 14, 1874, duly made an examination of the capital, securities, and affairs of the Buffalo Insurance Company of the City of Buffalo, N. Y., a joint-stock fire insurance company in process of organization:

Now, therefore, we do hereby certify and report under oath, as the result of said examination, that the sum of two hundred thousand dollars, ($200,000), the whole capital of said company, as fixed by its charter, has been fully paid in, and is now possessed by, the said company in money or in the stocks, bonds, and mortgages and other investments required and allowed by the provisions of the eighth section of the act entitled "An act to provide for the incorporation of fire insurance companies," passed June 25, 1853, (chapter 466, laws of 1853), and the amendments thereto, and that such capital is now possessed by the said corporation in the assets and investments particularly set forth and specified in Schedule A hereunto annexed, and that the said capital of the said insurance company was paid in by the several individuals and firms named in Schedule B hereunto annexed, and that they subscribed
68 for and took the number of shares and paid in the various amounts set opposite their names, respectively in cash, on or before the date of this certificate, as appears to our satisfaction, by the certificate of the corporators or officers under oath hereunto annexed and the other proofs filed herewith, and the personal examination made by us in the premises.

In witness whereof, we have hereunto subscribed our names, this fifteenth day of July, A. D. 1874.

WM. SMYTH,
JAMES HOLMES,
HAMILTON J. MILLS,
Commissioners.

STATE OF NEW YORK,
CITY OF BUFFALO AND COUNTY OF ERIE, } *ss.*

On this fifteenth day of July, A. D. 1874, before me, came William Smyth, James Holmes, and H. J. Mills, the commissioners above named, who, being by me duly sworn, did depose and say, and each for himself deposeth and saith, that he has no interest in the said Buffalo Insurance Company, and that the foregoing certificate, by them subscribed, is true.

WM. SMYTH.
69 JAMES HOLMES.
H. J. MILLS.

Subscribed and sworn before me, the 15th day of July, 1874.

THOS. BATH,
Notary Public in and for Erie County.

STATE OF NEW YORK,
CITY OF BUFFALO AND COUNTY OF ERIE. } *ss.*

Pascal P. Pratt and Edward B. Smith, being each duly sworn, depose and say, and each for himself deposeth and saith, that the said Pascal P. Pratt is the provisional president, and the said Edward B. Smith is the provisional secretary, of the joint stock fire insurance company in process of organization, known as the Buffalo Insurance Company, of Buffalo, N. Y., and the said president and secretary do hereby severally certify and declare, under oath, that the assets exhibited by them as the capital stock of said company, on the 15th day of July, 1874, to Wm. Smyth, James Holmes and H. J. Mills, the commissioners appointed by the superintendent of the insurance department, to examine the capital, condition and affairs of said company for the purpose of incorporation, was and is bona fide the property of said company, and
70 is now possessed by it in its corporate name and capacity, either in money or in such stocks, bonds and mortgages and other investments as are required and allowed by the provisions of the eighth section of the act entitled "An act to provide for the incorporation of insurance companies," passed June 25, 1853, (chap. 466, Laws of 1853,) and the amendments thereto, as is particularly set forth and specified in Schedule A, hereto annexed, and that no part of the said capital has been withdrawn, pledged, or in any manner impaired, and that no part or portion thereof has been loaned or advanced to said company by any person, partnership or corporation for the purpose of being used as such capital on the organization of said company.

Said deponents further severally depose and say that the said capital has been subscribed for and taken in good faith by divers individuals and firms, to the amount of two hundred thousand dollars, as is particularly specified in Schedule B, hereto attached; and

that the said individuals who have subscribed for and taken such stock have each paid the said company for the said stock so
71 by them respectively taken and subscribed for, in cash, at the par value thereof, at the various dates specified in said Schedule B.

And the said deponents further severally say, according to the best of their respective knowledge, information and belief, that there is no intention or design existing on the part of any person or persons whomsoever, to withdraw any part or portion of the said moneys and capital until the same is wanted for investment, or to be otherwise legitimately used or appropriated to and for the sole and exclusive use and benefit of the said company, in its corporate capacity, in strict conformity with the statute in such case made and provided; and that there is not any agreement, arrangement or understanding, either expressed or implied, made or existing between the said company, or its officers, or any or either of them, and the said stockholders, or any or either of them, or any other person or persons, to the effect or import that the money advanced or paid in by any stockholder, shall be loaned or returned to him, or to any stockholder, or any other person or persons, for his or their use or accommodation, upon the hypothecation of stock
72 of said company, as security therefor, or upon any other securities, terms or conditions whatsoever; and further, that the said company is not, nor are any of its officers, in any way, manner or form, pledged or committed to make any investment, loan or deposition of the said capital, or any part or portion thereof, which is not in strict conformity in all respects with the provisions of said chapter 466 of the statute laws of the State of New York, passed June 25, 1853, and the amendments thereto subsequently passed.

And the deponents further severally depose and say, that they do not know and are not informed of any matter, cause or thing, whatsoever, which, in their judgment or belief, can or will, in any manner or form, impair, lessen or jeopordizs the said capital, or any part thereof; and further they say not.

PASCAL P. PRATT.
EDWARD B. SMITH.

Subscribed and sworn before me, this 15th day of July, 1874.

THOS. BATH,
Notary Public in and for Erie County.

73 *Schedule A.*

Containing a particular description of all the assests owned by the Buffalo Insurance Company, on the fifteenth day of July, 1874, composing the original capital of said company paid in by the stockholders on its organization, viz., two hundred thousand dollars cash, deposited in the six following named banks:

Bank of Commerce of Buffalo	$46,100
Marine Bank of Buffalo	38,100
White's Bank of Buffalo	40,700
Farmers' and Mechanics' National Bank	31,800
First National Bank of Buffalo	23,850
Third National Bank of Buffalo	19,450
Total	$200,000

As appears by the certificate of the respective banks above named hereto annexed.

I, the cashier of the Bank of Commerce of Buffalo, Erie County, New York, do hereby certify that there is on deposit at this date, in said bank, the sum of forty-six thousand and one hundred dollars ($46,100) to the credit of the Buffalo Insurance Company.

Buffalo, July 15, 1874.

H. G. NOLTON, *Cashier.*

74 I, the cashier of the Marine Bank of Buffalo, Erie County, New York, do hereby certify that there is on deposit at this date, in said bank, the sum of thirty-eight thousand and one hundred dollars ($38,100) to the credit of the Buffalo Insurance Company.

Dated Buffalo, July 15, 1874.

S. M. CLEMENT, *Cashier.*

I, the president of White's Bank of Buffalo, Erie County, New York, do hereby certify that there is on deposit at this date, in said bank, the sum of forty thousand and seven hundred dollars ($40,700) to the credit of the Buffalo Insurance Company.

Dated Buffalo, July 15, 1874.

J. B. GRIFFIN, *Pres.*

I, E. G. Spaulding, president of the Farmers' and Mechanics' National Bank of Buffalo, Erie County, New York, do hereby certify that there is on deposit at this date, in said bank, the sum of thirty-one thousand and eight hundred dollars ($31,800) to the credit of the Buffalo Insurance Company.

Dated Buffalo, July 15, 1874.

E. G. SPAULDING, *Prest.*

I, the president of the Third National Bank of Buffalo, Erie County, New York, do hereby certify that there is on de-
75 posit at this date, in said bank, the sum of nineteen thousand four hundred and fifty dollars ($19,450) to the credit of the Buffalo Insurance Company.

Dated Buffalo, July 15, 1874.

A. ALTMAN, *Pt.*

I, the cashier of the First National Bank of Buffalo, Erie County, New York, do hereby certify that there is on deposit at this date in said bank the sum of twenty-three thousand and eight hundred and fifty dollars ($23,850) to the credit of the Buffalo Insurance Company.

Dated Buffalo, July 15, 1874.

CHARLES T. COIT, *C.*

Schedule B.

Containing a list of the original stockholders of the Buffalo Insurance Company, of Buffalo, N. Y., showing their respective names and residences, the number and amount of shares subscribed and paid for in cash by each stockholder respectively, with tbe various dates of such payments.

Amount of capital stock..... $200,000
No. of shares, 2,000, at $100 each..... $200,000

76

Name of Stockholders.	Residence (Street and Number).	No. of Shares.	Amount Shares. (Dolls.)	Date of Payment.
Pascal P. Pratt.....	736 Main street, Buffalo.....	50	5,000	July 11, 1874
Fred. L. Danforth..	43 Oak street, "	50	5,000	" 11, "
Jas. D. Sawyer.....	560 Delaware street, "	50	5,000	" 15, "
P. S. Marsh.....	556 Franklin street, "	50	5,000	" 14, "
Gibson T. Williams	1226 Main street, "	50	5,000	" 14, "
J. M. Hutchinson ...	175 W. Chippewa street, "	50	5,000	" 14, "
James G. Forsyth...	727 Main street, "	50	5,000	" 14, "
H. & A. Morse..	159 Niagara street, "	50	5,000	" 14, "
James R. Smith	611 Niagara street, "	50	5,000	" 11, "
Irwin & Sloan.....	Oswego	50	5,000	" 11, "
Mrs. L. H. Austin...	11 Niagara square, Buffalo.....	50	5,000	" 10, "
EdwardL.Stevenson	352 Washington street, "	50	5,000	" 9, "
Wm. H. Glenny.....	692 Main street, "	50	5,000	" 10, "
Matthias & Warren	75 Niagara street " ... / 222 North street, " ...	50	5,000	" 13, "
Charles W. Standort	New York.....	50	5,000	" 14, "
E. G. Spaulding.....	775 Main street, Buffalo	50	5,000	" 14, "
Francis W. Tracy...	Cor. Mohawk & Franklin st., Buffalo...	50	5,000	" 14, "
Edward B. Smith ...	727 Main street, " ...	40	4,000	" 15, "
Seneca A. Clark.....	48 North Pearl street, " ...	50	5,000	" 15, "
Townsend Davis.....	536 Main street, " ...	50	5,000	" 15, "
A. T. Blackmar.....	396 Delaware street, " ...	25	2,500	" 14, "
Edwin T. Evans.....	189 North street, " ...	50	5,000	" 15, "
Drullard & Hays.	564 Franklin street, " / 221 North street, "	50	5,000	" 10, "
S. M. Clement.....	737 Delaware street, " ...	50	5,000	" 14, "
Frank W. Fiske.....	199 Delaware street, " ...	25	2,500	" 10, "
Arthur Burtis.....	New York..... " ...	25	2,500	" 14, "
John B. Griffin	279 North street, Buffalo,.....	25	2,500	" 14, "
John H. Vought.....	770 Main street, "	25	2,500	" 14, "
Preston & Wright	367 Niagara street, " ... / 351 Niagara street, " ...	25	2,500	" 14, "
Wm. Meadows.....	91 Seventh street, "	25	2,500	" 14, "
David R. Morse.....	292 Franklin street, "	25	2,500	" 10, "

In witness whereof I have hereunto set my hand and affixed my official seal, at the city of Albany, this 18th day of Sept., 1874.

[SEAL.] O. W. CHAPMAN,
Superintendent.

It being agreed that the laws of New York called for by the said charter may be read by either party before the Supreme Court without their being herein copied; wherefore, after said rulings, the plaintiff here comes and presents this his bill of exceptions and prays that the same be signed, sealed and made a part of the record, which is accordingly done.

SAMUEL TREAT, *Judge.* [SEAL.]

82 The following opinion of his honor, Judge Treat, at final judgment, is as follows, to wit:

Opinion of Judge Treat at Final Judgment.

WEBSTER ET AL.
vs.
BUFFALO INS. CO.

This case was heretofere presented to the court; Justice Miller present. The demurrer to the replication raised the question whether the facts alleged would operate an estoppel, although the contract, as averred in the answer, was *ultra vires.*

It was suggested by Justice Miller that it would have been better if defendant had so shaped his answer as to bring before the court the charter of the company, together with the terms of the contract, so that the court could determine whether the contract was *ultra vires* or not.

But as that course had not been pursued, it was then for the court to decide whether, admitting the contract to be *ultra vires*, the defendant was estopped by the facts stated in the replication. On the demurrer to that replication, Justice Miller and myself
83 differed in opinion; and consequently judgment followed according to his views.

Now, the cause having come in for trial without the intervention of a jury, and all the facts in the replication being admitted of record, the main question is, whether according to the charter, under the laws of New York, the defendant corporation had authority, through its agents or otherwise, to make a contract of insurance of the kind stated—that is, on a sea-going or foreign voyage, as contradistinguished from an inland voyage.

According to the terms of the charter, the contract was *ultra vires;* and although all the facts set out in the replication are true, as admitted of record, yet according to the opinion of Justice Miller,

the plaintiff cannot recover in this case, and his opinion must control despite my dissent.

Therefore judgment must be entered for the defendant.

84 Know all men by these presents, that we, William H. Webster, as principal, and Henry M. Lowenstein, as surety, are held and firmly bound unto the Buffalo Insurance Company in the full and just sum of five hundred dollars, to be paid to the said the Buffalo Insurance Company, heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents. Sealed with our seals and dated this 15th day of January, in the year of our Lord one thousand eight hundred and eighty-one.

Whereas, lately at the September term, 1880, of the Circuit Court of the United States for the Eastern District of Missouri, in a suit depending in said court between William H. Webster et al., plaintiffs, and The Buffalo Insurance Company, defendant, judgment was rendered against the said plaintiffs, and the said plaintiffs having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

Now, the condition of the above obligation is such, that if the said plaintiffs shall prosecute said writ to effect and answer all damages and costs if it fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

WILLIAM H. WEBSTER. [SEAL.]
HENRY M. LOWENSTEIN. [SEAL.]

Approved by
SAMUEL TREAT, *Judge.*

(Endorsed:) No. 1549. United States Circuit Court, Eastern District of Missouri. William H. Webster et al. vs. Buffalo Insurance Company. Bond, 500_{100}^{00}$.

UNITED STATES OF AMERICA, }
85 EASTERN DISTRICT OF MISSOURI. } *ss.*

I, M. M. Price, clerk of the Circuit Court of the United States in and for the Eastern District of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record and proceedings in case No. 1549, of William H. Webster et al.,

plaintiffs, against Buffalo Insurance Company, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this 18th day of February, in the year of our Lord eighteen hundred and eighty-one.

[SEAL.]

M. M. PRICE,
Clerk of said Court.

By T. L. CRAWFORD,
Deputy.

(Endorsed on cover:) E. Missouri, C. C. U. S. No. 230. William H. Webster et al., plaintiffs in error, vs. The Buffalo Insurance Company. Filed 16th March, 1881.

110-386

FILED
JAN 13 1891
JAMES H. MCKENNEY

Supreme Court of the U. S.

WILLIAM H. WEBSTER, *et al.*

vs. No. 230.

THE BUFFALO INSURANCE COMPANY.

Brief of Plaintiff.

JEFF. CHANDLER,
Atty. for Plaintiff.

Supreme Court of the U. S.

WILLIAM H. WEBSTER, *et al't.*
vs.
THE BUFFALO INSURANCE COMPANY.
No. 230.

This is an action on a policy of marine insurance on a cargo of crockery shiped from Liverpool, England to St. Louis, Missouri. The perils insured against, are found in the body of the policy printed on page 10 of the record, and are set forth as follows. "Touching the liabilities and perils which the said insurance company hereby assumes and takes upon itself in the premises, they are of the seas, rivers, fires, — pirates, overpowering thieves, (but no other thieves,) jettisons and other perils, losses and misfortunes that have or shall come to the injury, detriment or damage aforesaid." The cargo was lost on the voyage covered by the policy, and the defendant company refused to pay, on the ground that its charter gave it no power to take marine risks.

This plea the defendant set up in its answer. The plaintiff replies to that plea as follows: "And for a further reply to the second defence pleaded by defendant, they say that it is wholly immaterial whether said corporation had power under its charter to make said contract, because they say that defendant is estopped to set up said defence for the following reasons to wit:

Plaintiffs allege, that by the terms of said contract, the defendant undertook and agreed with said firm of Webster, Heinicke & Coglin to insure and did insure said firm against the risks and perils of the seas, on shipments of merchandise to them at St. Louis for their account, or for account of others when instructed to insure by endorsements on bill of lading or otherwise, plaintiffs stipulating to report such shipments and modes of transit promptly to defendant's office in this city of St. Louis, as soon as advised thereof, and plaintiffs allege that as soon as they were advised of said shipment, to wit: on the 26th day of February, 1879, they notified defendant at its office in said city of St. Louis, of the shipment to them at the said city of St. Louis, from the port of Liverpool, England, on some steamboat whose name was then unknown to said firm, of the merchandise mentioned in plaintiffs petition, and requested defendant to enter said shipment on defendant's books at the valuation of four thousand dollars, and then and there delivered to defendant a written and printed application for entering said merchandise, under said policy, upon a blank form furnished by defendant therefore, whereupon the defendants by and through its agents W. R. Ker & Co., who were then and there duly authorized so to do, accepted said notice, and then and there agreed to accept said risk for said firm under said policy of insurance, and to enter the same upon the books of said company, and to cover the merchandise mentioned in plaintiff's petition under said policy in the sum of four thousand dollars, that afterwards on the 6th day of March, 1879, the defendant, for the first time, notified said firm of Webster, Heinicke & Coglin, that it had no power under its charter to effect insurance upon ocean risks, and returned said application to said firm. That long prior

to said last named date to wit: on the first day March, 1879, it became well-known in the city of St. Louis and elsewhere, and the fact was, that the steamer Memphis, upon which the merchandise of plaintiff's said firm was laden, had been totally wrecked, and said merchandise lost and destroyed as alleged in plaintiff's petition, and by reason thereof, it became and was impossible for said firm of Webster, Heinicke & Cogan, to effect other insurance upon their said merchandise, as defendant then and there well knew; and plaintiffs further allege that by reason of the language employed in said contract of insurance, touching the liabilities, perils and risks assumed by defendants as aforesaid, and by reasons of the agreement of defendants at the time when said shipment was reported to defendant on the 26th day of February, 1879, as aforesaid, plaintiffs said firm were led to believe and did believe that defendant was fully authorised and empowered to make said contract, and that but for said belief, they could and would have effected other insurance on said merchandise on said 26th day of February, 1879. That plaintiff's said firm never had any knowledge or information of the authority conferred upon defendant by its charter until apprised thereof as before stated, on said 6th day of March, 1879. That plaintiffs are now informed and believe that defendant was incorporated and created under the laws of the state of New York; and the said firm had no opportunity of knowing, and did not know except by its undertakings and agreements as hereinbefore set forth, what powers were conferred upon said corporation; that plaintiff's said firm in procuring said insurance upon said merchandise acted in entire good faith; and if said defendant had not the power to make said contract and to effect said insurance for plaintiff's said firm, it has deceived and misled plain-

tiff's said firm into the belief that it had power to enter into said undertaking, and ought not now to be permitted to avail itself of the defence of want of power to make said contract." On page 19 of record, the finding of the facts by the Court is set forth, the issues on the replication being found for plaintiffs. On page 36 of record the decision of Judge Treat is found, and is as follows: This case was heretofore presented to the Court; Justice Miller present. The demurrer to the replication raised the question whether the facts alleged would operate an estoppel, although the contract as averred in the answer was *ultra vires*. * * * * * Now the cause having come in for trial without the intervention of a jury, and all the facts in the replication being admitted of record, the main question is, whether according to the charter, under the laws of New York, the defendant corporation had authority through its agents or otherwise, to make a contract of insurance of the kind stated, that is, on a sea-going or foreign voyage as contradistinguished from an inland voyage. According to the terms of the charter the contract was *ultra vires*; and although all the facts set out in the replication are true, as admitted of record, yet, according to the opinion of Justice Miller, the plaintiffs cannot recover in this case, and his opinion must control, despite my dissent. Therefore judgment must be entered for the defendant."

So that the exact issue here presented and passed upon below may be distinctly understood attention is called to the answer of defendant, found on page 9 of the record. *Third.* And for another and further defence to said plaintiff's said action in said petition stated and set forth, the defendants say that they never made but one contract or policy of insurance with the said firm of Webster, Heinicke and Coglin, which said contract or

policy of insurance is in words and figures printed and written as follows: Here follows precisely the contract set forth in the petition, so that it appears from the pleadings that the contract described in the petition to insure against the *perils* therein mentioned is admitted. It is also admitted that the contract was made with *defendant*. There is no complaint in the answer that the agents of defendant in St. Louis *abused their authority as agents* in making the contract sued on, but it is admitted that whatever the contract is, it was made by the corporation itself. That is to say the pleadings *establish* that the defendant company, in a state foreign to the state of its creation, entered into a contract to insure against the *perils of the seas;* that plaintiffs at the time of the making of said contract had no knowledge of want of power in defendant to make the same; that plaintiffs were deceived and misled, not by defendants *agents in St. Louis*, but by the defendant corporation itself, into the belief that defendant had power to make such contract. (See replication p. 15, admitted by demurrer.) The issues of facts alleged by plaintiff, other than those admitted by the demurrer to plaintiff's reply, were found by the Court in favor of plaintiff. (See page 20 of record.)

So that in addition to the facts already mentioned, which are *established by the pleadings*, the court finds from the evidence, *all the other issues for plaintiff*, except that defendant, under its charter, was not authorized to take ocean risks. Plaintiffs, in good faith, entered into the contract sued on, paid the premium therefor; defendant retained the insurance till the cargo was lost, when it disclosed, for the first time, its want of power to so insure. The position of plaintiffs had then become changed and their power to get insurance gone, and

they had suffered loss admitted on page 18 of record to be $5010.

Upon this state of facts plaintiffs claim that the court below erred in giving judgment for defendant, but should have given judgment for plaintiff for the said sum of $5010; that the court erred in sustaining the answer to plaintiffs' replication to defendants' defence of *ultra vires.*

To reverse the judgment of the court below the plaintiffs rely upon the following points and authorities.

This does not present a case where that which defendant contracted and agreed with plaintiffs to do was *prohibited* by defendant's charter. It is not business, not proper to be done. It is not a case where defendant undertook to insure against a class of perils, which did not come within its power to insure against. Perils of the seas are kindred to the perils of inland navigation on the great lakes. So that when the case is reduced to its real degree of excess of power of defendant to make the contract sued on, it is found to be only that *affirmation power is not conferred* upon defendant to insure against perils on the *ocean* which it did have *affirmation power* to insure against on the *great lakes.* This is but a slight excess of power at best.

It will be insisted in this brief that if it be conceded in this case that the defendant had no power to enter into the contract and bind the company to perform the obligations assumed, *viewed as a mere question of corporate power,* yet having undertaken to do so, and having received the full consideration agreed to be paid by plaintiff, and he having *fulfilled his entire contract,* defendant cannot now, after a loss has occurred to plaintiff, be permitted to set up that *excess of authority* to excuse it

from that part of the contract which imposes an obligation on defendant.

De Groff *vs.* Am. Lin. Th. Co., 21 N. Y., 127–8;
Bissel *vs.* M. S. & N. I. R. R. Co.'s, 22 N. Y., 262;
Parish *vs.* Wheeler, 22 N. Y., 494;
Buffett *vs.* Troy & Boston R. R. Co., 40 N. Y., 168;
Whitney Arms Co. *vs.* Barlow, 63 N. Y., 62 G.C.

The doctrine of this last case, to wit, the doctrine of *ultra vires*, whether invoked for or against a corporation, is not favored in the law. It should never be applied where it will defeat the ends of justice, if such a result can be avoided, is approved by this court.

San Antonio *vs.* Mehaffy, 96 U. S., 315.

In the case of County of Macon vs. Shores, 97 U. S., 279, this court quotes and approves from a Pennsylvania case (13 Pa. St., 13) the following:

" A corporation had occupied for a term agreed upon, as an office, premises belonging to other parties.

When sued for the rent, the corporation set up as a defence that the contract was *ultra vires*, and claimed exemption from liability upon that ground. Coulter, J., in the opinion of the court affirming the liability, said: " Some things lie too deep in the common sense and common honesty of mankind to require either argument or authority to support them, and this, I think, is one of them." In the case of Perkins *vs.* R. R. Co., 47 Maine, 573, touching a contract to carry beyond its own line, though the company might have had no special authority by their charter to make such contracts, the court say. they could not plead such want of authority against

persons contracting with them." In Hitchcock *vs.* Galveston, 96 U. S., 351, this court held: "But the present is not a case in which the issue of the bonds was prohibited by any statute. At most the issue was unauthorized. At most there was a defect of power. The promise to give bonds to the plaintiff in payment of what they undertook to do was therefore at farthest only *ultra vires;* and in such a case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held on its contract. Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised to return in the mode in which it promised to perform. * * * * Although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise *and in execution of the contract,* to expend money and perform his part thereof, the corporation is liable on the contract."

State Board of Ag. *vs.* R. R. Co., 47 Ind., 407.

"Where a corporation has entered into a contract which has been fully executed on the other part, and nothing remains but the payment by the corporation of the consideration, it will not be allowed to set up that the contract was *ultra vires.*"

Oil Creek R. R. Co. *vs.* Pa. Trans. Co., 83 Pa. St., 160.

When a contract with a corporation is executed by either party it cannot plead *ultra vires.*

Hays *vs.* Galion Gas Co., 29 Ohio St., 330, 340.

Darst *vs.* Gale, 83 Ill., 136, holds that the general rule is, that the plea of *ultra vires* shall not prevail when, instead of advancing justice, it would accomplish wrong; and it makes no difference in this respect, whether it is interposed for or against a corporation.

"In Germantown Farmers' Mut. Ins. Co. *vs.* Dhein, 43 Wisconsin, 42, it is held "that while contracts of corporations, which they have no authority to make, may be void, contracts which are within the general scope of their powers, but which are *in excess* of those powers in some particulars, are valid, unless by reason of such excess they are against public policy."

In Thompson *vs.* Lambart, 44 Iowa, 239, (a private corporation case,) it is said: "As we understand the rule *ultra vires* prevails in full force *only* where the contracts of corporations of this character remain wholly *executory*."

In Land *vs.* Coffman, 50 Mo., 242, it is said: "There is a manifest distinction between executory and executed contracts."

See Sedgwick (Stat. and Con. Law) 73.
National Bank *vs.* Mathews, 98 U. S., 629.

It is submitted that there is no essential difference in principle between the application of the doctrine of estoppel to private trading corporations and to co-partnerships. "At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital or the union of large numbers that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them." (Paul vs. Virginia, 8 Wall., 181-2.) Twenty persons may form a co-partnership, and if they

hold out an agent with apparent authority to transact certain business, whether the agent possess the real authority or not, the principals will be bound if he acts within the scope of his *apparent authority;* while if the same twenty men become incorporated they may deceive those who deal with them in respect of their power, and may exceed it with impunity for the purpose of gain, and in case of loss, shelter themselves under doctrine of *ultra vires.*

The nature of corporate power bestowed upon individuals for trading purposes is that of *privilege.* The personal liability of the persons comprising the corporation is limited. They are *favored* in this respect above co-partners. The relation of the corporation when formed, to the public in all other respects are the same as those of natural persons. They enter into business upon precisely the same terms as natural persons. Cooley on Torts, page 119, 121, says that "corporations are responsible for the wrongs committed or authorized by them under substantially the *same rules* which govern the responsibility of natural persons. It was formerly supposed that those wrongs which involved the element of evil intent, such as batteries, libels, and the like, could not be committed by corporations, inasmuch as the State in granting them rights for lawful purposes had conferred *no power* to commit unlawful acts, and such torts committed by corporate agents must consequently be *ultra vires,* and the individual wrong of the agents themselves. But this idea no lawyer obtains."

In the case of Chestnut Hill and Spring House Turnpike Co. vs. Rutter, 4 S. & R., 11, it is said: "If a corporation be the intangible being it is asserted to be, a greater and more mischievous monster cannot be imagined. According to the doctrine contended for, if

they do an act within the scope of their corporate powers, it is legal, and they are not amenable for it. If the act be not within the scope of their legitimate powers they had no legal right to do it. It was not one of the objects for which they were incorporated, and therefore it is no act of the corporation at all. This doctrine leads to absolute impunity for every species of wrong, and can never be sanctioned by any court of justice."

See in support of same doctrine Booger vs. Life Ass. of America, 75 Mo. Report, 320.

It will not be forgotten that the replication of plaintiff, found on page 15 of record, avers that "if defendant had not *the power to make said contract and to effect* said insurance for plaintiff's said firm, it has deceived and misled plaintiff's said firm into the belief that it had power to enter into said undertakings, and ought not now to be permitted to avail itself of the defence of want of power to make said contract." This is admitted by defendant as one of the facts in the case. It is no *abuse* of authority by the *agents* of defendant, but the allegation is that the *defendant corporation itself* made the contract sued on, and that the *defendant corporation itself deceived* plaintiff in respect of its power, and caused plaintiffs to believe it had the power to make the contract.

The precise question here is, can a group of persons, incorporated for purposes of gain, reap profits from fraud and deception, and escape liability therefrom, under the plea of *ultra vires*. We insist that a charter granted to persons for trading purposes is subjected to the maxims of law theretofore existing, to the same extent as an individual or co-partnership is; and that a corporation can-

not take advantage of its own wrong, and reap a harvest from fraud and deceit, any more than can a natural person. If the contrary doctrine be the correct one, then the privilege of a charter is the privilege of immunity, from the maxims of law which hold individuals not incorporated to fair and honest dealings, though transacting the same business as the persons having the charter.

A charter when granted by the state, presupposes the then existence of principles of common honesty, and an established system of jurisprudence, which principles and system of jurisprudence became by force of law incorporated into the charter itself. It presupposes the existence of principles then built into the law of mutuality of obligations and liabilities. The corporation when created becomes protected by principles of equity, theretofore established, from frauds against it, though nothing is said in its charter about such principles; on the other hand, the charter when granted rests upon the state of the law as it then is, and becomes subject to and restrained by its canons set againt fraud and deceit; and such charter cannot rightfully be construed to permit fraud and deceit by the corporation in its dealings with individuals. The whole system of law, when taken together, and of which the charter is only a part, is created to frustrate fraud, deceit and wrong.

JEFF. CHANDLER,
Atty. for Plaintiff.

SUPREME COURT

OF THE UNITED STATES.

October Term, A. D. 1883.

No. 230.

WILLIAM H. WEBSTER AND
ROBERT T. COGLIN,
Plaintiffs in Error

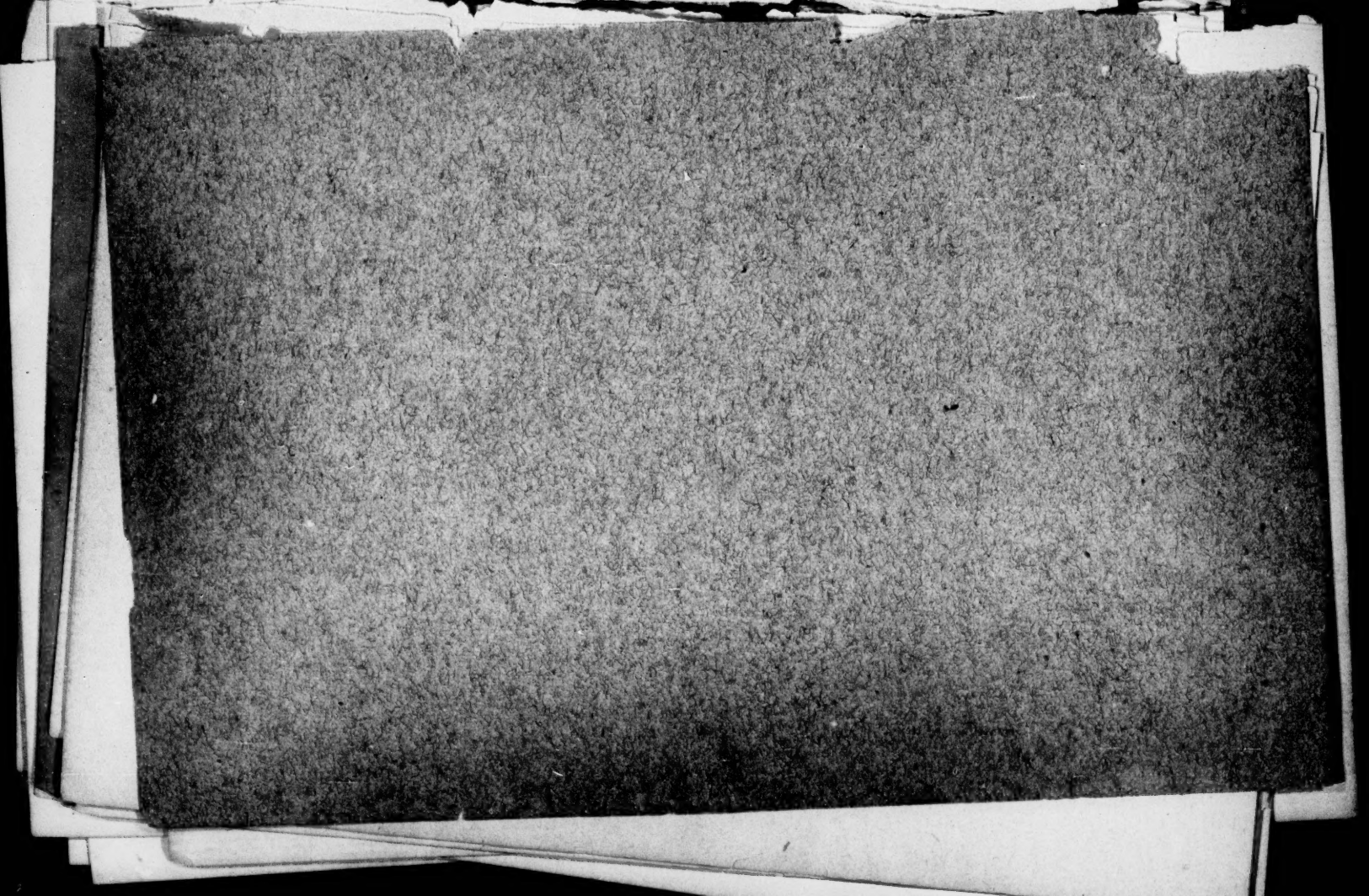
versus

THE BUFFALO INSURANCE COMPANY,
Defendants in Error

Brief for Defendants in Error.

O. B. SANSUM,
For Defendants in Error.

W. B. Stansbury & Co. Print, 39 Natchez st., N. O.



SUPREME COURT

OF THE UNITED STATES.

October Term, A. D. 1883.

No. 230.

WILLIAM H. WEBSTER AND
ROBERT T. COGLIN.
Plaintiffs in Error,

versus

THE BUFFALO INSURANCE COMPANY,
Defendants in Error.

Brief for Defendants in Error.

I.

Plaintiffs in Error have failed to state a cause of action. They demand judgment for a loss by perils of the seas, on goods shipped at Liverpool, England, but there is nothing in their petition to show that defendants undertook to insure goods laden at that port. The words of

the petition respecting their undertaking are: "Defendants delivered to said persons composing the firm of Webster, Henicke & Coglin, its open cargo policy of insurance, herewith filed, numbered 0523, whereby it undertook and agreed to cause said firm of Webster, Henicke & Coglin, to be insured, lost or not lost, on shipments of merchandise to them at said city of St. Louis, for their account or for account of others, when instructed to insure by endorsement on bill of lading or otherwise; said firm stipulating to report all such shipments, and mode of transit promptly to the office of the defendant in the city of St. Louis, as soon as advised thereof, in an amount not exceeding in the aggregate upon one vessel the sum of $5000."

In all that has been set out there is not one word to show the place or places at which the shipments were to be made, and there is nothing to show that defendants undertook to insure the parties named on all shipments made for their account at all the ports of the world; on the contrary they have limited the contract to "*shipments,*" for the averment is "*on shipments;*" but at what place the shipments were to be made, nothing is averred. In this respect plaintiffs fail to state right or title.

The petition fails to show that plaintiffs had any insurable interest in the goods mentioned. The averment in this respect is: "The said firm of Webster, Henicke & Coglin caused to be shipped from the port of Liverpool,

England, etc., for their own account, eighty crates of queensware,"—*non constat*, that the insured had any insurable interest in the goods mentioned when this shipment was made, for the goods may have been *then* the property of the shipper, or they may have been consigned to a person other than the insured. And even if the allegation be deemed an averment of interest in the insured *at the time the goods were shipped*, still there is nothing in the petition to show that the insured had any interest in the goods at *the time the loss happened*.

The law is well settled that a person who procures insurance to be made in his own name, must have an insurable interest in the thing insured, when it is insured. If he has none, the contract is void, because it is against public policy to permit any one to insure who has no insurable interest in the thing insured; and the contract being void, an interest acquired subsequently, cannot make valid that which was void *ab initio*. Hence the law declares that a person who seeks to recover upon a contract of insurance, must aver and prove that at the making of said contract, and from thence, continually thereafter, until the said loss happened, the plaintiff was interested in the said goods, etc., to the sum insured. If there be no averment of interest, the law presumes against the proof,—that there was none.

Ruse vs. Mut. Benefit Ins. Co., 23 N. Y., 516; *Freeman vs. Fulton Fire Ins. Co.*, 38 Barb., 247; *Williams vs. Insurance Co.*, N. A., 9 How. Pr., 365; *Cousins vs. Nantes*, 3 Taunton, 513; *Pole vs. Fitzgerald*, Willes, 641; *Stockdale vs. Dunlop*, 6 M. & W., 224; *Anderson vs. Morice*, 10 L. R. C. P., 609.

There is nothing in the petition to show that the insured were instructed to insure the goods mentioned. The averment in this respect is: "On shipments for their account, or for account of others, *when instructed to insure.*" The defendants were to be bound only for shipments that Webster, Henicke & Coglin were instructed to insure. The shipment being made for their account does not absolve either party from the letter of the contract, for the condition applies to shipments for their account and for the account of other persons.

The judgment must be affirmed because plaintiffs state no cause of action against the defendants. If the judgment had been against the defendants they could arrest it in this court. The defects stated are fatal because they are substantive defects. If the defendants had demurred generally the demurrer must have been sustained; and the same defects may be urged here.

II.

Defendants answered plaintiffs' petition by traversing generally all the allegations stated therein, and pleaded specially,—two separate defences.

First. That they had no power given them under their charter to make the alleged contract. This is the plea of *ultra vires.*

Second. That the only contract defendants ever made with the firm of Webster, Henicke & Coglin, was a certain policy of insurance which they set out in their plea, word for word; they averred that it did not include shipments of goods laden at Liverpool, and they prayed the judgment of the Court thereon.

Plaintiffs demurred to the plea of *ultra vires*. The demurrer was overruled, and the plea adjuged good. Plaintiffs then pleaded over,—*first*, a general traverse to the plea of *ultra vires*; *second*, special matter to estop defendants from interposing *that plea*; and, *third*, a special traverse to defendants second defence, namely that the contract did not include shipments made at Liverpool.

Defendants demurred to plaintiffs' second replication to the plea of *ultra vires*, and they demurred to plaintiffs' third replication, on the ground that no traverse can be made on a conclusion of law—that the policy set out in the plea being the admitted contract, the question, whether it includes shipments laden at Liverpool is for the Court—not to be sent to the jury upon an unlawful traverse.

No lawyer wants to be told that the law forbids the pleader to traverse a question of law. The demurrer was sustained.

The law is well settled, that he who demurs to a plea and then pleads over to it, shall never be heard to question the plea;—as to the parties litigant the plea is *res judicata*. By pleading over plaintiffs confessed that the plea was good in law and in fact—pleading over to this plea of *ultra vires* puts outside of the case all question as to the defendants' right to say that they had no power to make the contract alleged. Plaintiffs' general traverse *denying* that defendants had *not the power*, made it necessary, under the wretched system of pleading which prevails in Mis-

souri, for defendants to exhibit their charter to support and make good their plea of *ultra vires*. The parties, by stipulation in writing, submitted the case to the court below upon that issue only, for that was the only issue of fact between them. The shipment and the value of the goods and the loss were not disputed.

The court found the issue on defendants' plea of *ultra vires* for the defendants. The finding of the court upon that issue stands as the finding of a jury upon it, and this court has not the slightest power under the law to look into the evidence for the purpose of revising the finding of the court below, upon this or upon any other issue of fact.

But if this were not conclusive, another fact in the proceedings below make it so. The court below found that the defendants did not have power to make the contract alleged, and the plaintiffs concede that the finding is true, for they have never, by word or gesture, dissented. They did not say, in the court below, We except to the finding; and, having failed to except to the finding, they cannot now, for the first time, bring the charter into this court by bill of exceptions, and point out in what particular respect the charter gave defendants the power to make the contract.

O. B. SANSUM,

For Defendants in Error.